U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOYCE G. OWENS and DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS, Talladega, AL

Docket Nos. 01-1804 & 01-1945; Submitted on the Record;
Issued July 17, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on its determination that the selected position of social services aide represented appellant's wage-earning capacity; (2) whether the Office properly determined that appellant received an overpayment in the amount of $12,333.89 during the period January 30 through November 4, 2000; (3) whether the Office properly denied waiver of the overpayment; and (4) whether the Office abused its discretion by ordering repayment of the overpayment by deducting $330.00 from each of appellant's continuing periodic compensation payments.

On April 26, 1995 appellant, then a 48-year-old case management coordinator, filed a traumatic injury claim alleging that on April 24, 1995 he sustained a hematoma of the left leg below the knee, a bruise on the left shoulder, middle back and left foot, and pain in the left hip and on the left side of his lower and middle back while attempting to place leg restraints on an inmate. He stopped work on April 27, 1995.

By letter dated May 24, 1995, the Office accepted appellant's claim for a contusion of the left leg, ankle and shoulder and a lumbar strain. Subsequently, the Office expanded the acceptance of appellant's claim to include authorization for intradiscal thermocoagulation.

The Office received a report from Dr. J.R. Payne, a Board-certified orthopedic surgeon and appellant's treating physician, indicating that appellant could perform light-duty work with certain physical restrictions. The employing establishment advised the Office that it did not have any light-duty work available for appellant.[1]

[1] On November 6, 1995 the Office referred appellant to a vocational rehabilitation counselor based on Dr. Payne's opinion. However, the Office subsequently closed appellant's rehabilitation case pending clarification of numerous medical issues.

In a May 19, 1998 letter, the Office asked Dr. Kenneth G. Varley, Board-certified in pain medicine and appellant's treating physician, to determine appellant's functional capabilities based on an accompanying functional capacity evaluation report to reactivate appellant's vocational rehabilitation.

In response, Dr. Varley submitted a June 16, 1998 report agreeing with the findings of the functional capacity evaluation that submaximal effort was present and that appellant's performance did not provide a valid picture of his capabilities. He stated although appellant's performance rated him at light-duty work, appellant was capable of medium entry work 8 hours a day, 40 hours a week with certain physical restrictions.

On August 11, 1998 the Office referred appellant to a vocational rehabilitation counselor to obtain light-duty sedentary work. In a November 19, 1998 report, the rehabilitation counselor identified the positions of counselor and social services aide as being within appellant's educational and vocational qualifications and commuting area.

On December 11, 1998 appellant advised the Office that he was unable to perform the duties of the selected positions or any type of work due to his back condition.

In a December 29, 1998 letter, the Office requested that Dr. Varley determine whether appellant was still medically able to participate in job search activities and whether appellant could perform the duties of a counselor and social services aide accompanied by a description of these positions.

By letter dated February 2, 1999, Dr. Varley opined that appellant was functionally capable of participating in vocational rehabilitation services, including job search activities. He noted that during his last examination of appellant on December 23, 1998, no pain generators were noted. Dr. Varley further noted that based on the functional capacity evaluation, appellant was able to function at a medium job classification, which included work as a counselor and social services aide.

In a March 16, 1999 notice of proposed reduction of compensation, the Office advised appellant that it proposed to reduce his compensation because the medical and factual evidence of record established that he was no longer totally disabled. The Office further advised appellant that he was partially disabled and that he had the capacity to earn the wages of a social services aide. The Office requested that appellant submit additional evidence or argument within 30 days if he disagreed with the proposed action.

In an April 2, 1999 response, appellant stated that he disagreed with the results of the functional capacity evaluation which Dr. Varley relied upon in finding that he could perform light-duty work eight hours a day with restrictions.

By decision dated June 25, 1999, the Office finalized the proposed reduction of compensation effective June 20, 1999. In a July 16, 1999 letter, appellant, through his counsel, requested an oral hearing before an Office representative. In a letter dated August 17, 1999, he requested that the Office cancel his oral hearing request. Instead, appellant requested reconsideration of the Office's decision.

In an April 5, 2000 decision, the Office denied appellant's request for modification based on a merit review of the claim. By letter dated April 27, 2000, appellant requested reconsideration of the Office's decision.

By decision dated June 14, 2000, the Office again denied appellant's request for modification based on a merit review of the claim.

In a February 6, 2001 letter, the Office made a preliminary determination that an overpayment in compensation had occurred in the amount of $12,333.89. The Office stated that appellant was paid compensation for total disability instead of compensation for loss of wage-earning capacity from January 30 through November 4, 2000. The Office advised appellant that he was without fault in the creation of the overpayment. In addition, the Office advised appellant that he could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment and if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof.

In a March 9, 2001 letter, appellant requested reconsideration of the Office's June 14, 2000 decision.

By decision dated June 13, 2001, the Office denied appellant's request for modification based on a merit review of the claim.[2]

In response to the Office's February 6, 2001 letter regarding the overpayment, appellant submitted a completed overpayment questionnaire and supporting documentation.

By decision dated July 11, 2001, the Office finalized its preliminary determination regarding the fact of overpayment and the amount of the overpayment. The Office also found that appellant was not entitled to a waiver of the overpayment. In addition, the Office ordered repayment of the overpayment by deducting $330.00 from each of appellant's continuing periodic compensation payments.

The Board finds that the Office properly reduced appellant's compensation based on its determination that the selected position of social services aide represented appellant's wage-earning capacity.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] Pursuant to section 8115(a) of the Federal Employees'

[2] The Board notes that subsequent to the Office's June 13, 2001 decision, the Office received medical evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision; *see Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501.2(c).

[3] *Patricia A. Keller*, 45 ECAB 278 (1993).

Compensation Act,[4] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.[5]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's Dictionary of Occupational Titles or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.[6] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[7]

In this case, the Office relied on Dr. Varley's opinion that appellant could work 8 hours a day, 40 hours a week in the position of social services aide. Dr. Varley's opinion was based on a February 13, 1998 functional capacity evaluation and his examination of appellant. In his work capacity evaluation, Dr. Varley indicated that appellant's physical restrictions, which included walking and standing in intervals of no more than 30 minutes, no sharp twisting more than 60 degrees, pushing no more than 105 pounds, pulling no more than 130 pounds, lifting no more than 50 pounds and squatting, kneeling and climbing 30 minutes or less. Dr. Varley also indicated that appellant should have 1 break from 30 minutes to 1 hour and 2 breaks, 15 minutes each.

The position of social services aide was a light-duty job that required occasional lifting less than 20 pounds and no climbing, balancing, stooping, kneeling, crouching, crawling, feeling, taste/smelling, far acuity, depth perception, color vision and field vision. The position also required occasional reaching, handling and fingering. In addition, it required frequent talking, hearing, near acuity and accommodation. The Board finds that the selected position falls within appellant's physical limitations.

The selected position required one to two years of specific vocational preparation. The vocational rehabilitation counselor indicated that appellant had a bachelor's and a master's degree in social science (criminal justice) and 14 years of experience as a case manager/case manager supervisor in federal prison systems. The Board, thus, finds that the selected position falls within appellant's vocational skills.

[4] 5 U.S.C. § 8115(a).

[5] *See Dorothy Lams*, 47 ECAB 584 (1996).

[6] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[7] 5 ECAB 376 (1953).

The vocational rehabilitation counselor also indicated that the job of social services aide was reasonably available in appellant's commuting area.

Further, the Office properly applied the principles set forth in the *Shadrick*[8] decision to determine appellant's loss of wage-earning capacity.

The Board also finds that appellant did not submit sufficient medical evidence, following the Office's decision dated March 16, 1999 and finalized June 25, 1999, to establish that he was not medically capable of performing the social services aide position.

The pertinent medical issue regarding appellant's capability to perform the selected social services aide position is whether there has been any change in his condition such that he would no longer be able to perform the position. In order for a physician's opinion to be relevant on this issue, that physician must address the job factors of the selected position.

Appellant has not submitted any medical opinion evidence that addressed his inability to perform the duties of the selected position of social services aide.

Accordingly, the Board finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

The Board further finds that the Office properly determined that appellant received an overpayment in the amount of $12,333.89 during the period January 30 through November 4, 2000.

In this case, the Office calculated that appellant received total disability compensation in the amount of $32,205.89 and subtracted $19,872.00, the amount appellant should have received for partial disability based on his wage-earning capacity during the period January 30 through November 4, 2000. Therefore, the Office properly found that an overpayment existed in the amount of $12,333.89.

The Board also finds that the Office properly denied waiver of the overpayment.

Section 8129 of the Act[9] provides that an overpayment must be recovered unless "incorrect payment has been made to an individual who is without fault *and* when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.[10]

[8] *Id.*

[9] 5 U.S.C. § 8129(a)(6).

[10] *See James M. Albers, Jr.*, 36 ECAB 340 (1984).

Section 10.436[11] provides that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses and the beneficiary's assets do not exceed the resource base of $3,000.00 for an individual or $5,000.00 for an individual with a spouse or one dependent plus $600.00 for each additional dependent. For waiver under the "defeat the purpose of the Act" standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base of $3,000.00.[12]

In determining that appellant was not entitled to waiver of the overpayment, the Office obtained figures from appellant's overpayment recovery questionnaire dated February 22, 2001 and a letter of the same date. The Office determined that appellant had a total monthly income of $6,238.00, consisting of $3,392.13 in compensation and $2,845.87 in earnings. The Office determined that appellant's monthly expenses totaled $6,122.14, based on his mortgage of $647.60, $720.00 for a second mortgage, $50.00 for household expenses, $531.26 for food, $183.00 for clothing, $95.89 for car insurance (two cars), $160.00 for gas (two cars), $496.52 for utilities, $49.70 for cable, $138.66 for life insurance, $2,836.46 for loans/credit cards, $213.05 for other medical expenses. The Office eliminated some of the expenses set forth by appellant. The Office reduced appellant's son's cellular telephone usage from $260.75 to the reported usual monthly rate of $35.00. The Office also reduced the amount of expenses for auto insurance and gas for appellant's four vehicles because only two vehicles per family were allowed under the Act.[13] In so doing, the Office divided the total amounts provided and divided by four to obtain the average amount paid for each car. Further, the Office reduced expenses for water and sewer from $64.42 to $23.00 the reported usual monthly amount.

The Office further found that appellant had $125.00 in cash on hand, $309.00 in a checking account and $20.00 in a savings account.[14] The Office also found additional assets in the amount of $18,823.72 in stocks/bonds. The Office then found that as appellant's income and assets exceeded the dollar criteria, recovery would not defeat the purpose of the Act.

The Board has stated that the guidelines for recovery of an overpayment from an individual who is without fault were meant to read conjunctively and that the overpaid individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his income to meet his current ordinary and necessary living expenses and also that his assets, those

[11] 20 C.F.R. § 10.436.

[12] *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *Jesse T. Adams*, 44 ECAB 256, 260 (1992).

[13] The Board notes that the Office's procedure manual rather than the Act provides for the allowance of expenses for only up to two vehicles per family; *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6a(3)(a) (September 1994).

[14] The Office did not consider the amounts in appellant's checking and savings accounts as assets for its overpayment determination.

which are not exempted, do not exceed a resource base of $3,000.00 (or $5,000.00 with a spouse or dependent).[15]

As appellant listed assets in excess of $6,800.00 for himself and his wife and three dependent children, this resource base clearly exceeds that stipulated as the maximum allowable for a claimant with dependents, in order to defeat the purpose of the Act. Therefore, appellant has not demonstrated that recovery would defeat the purpose of the Act as is required for waiver.

The Office found that repayment in this case would not be against equity or good conscience.

With regard to the "against equity and good conscience" standard, section 10.437 of the regulations provides:

> "(a) Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.
>
> "(b) Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. In making such a decision, [the Office] does not consider the individual's current ability to repay the overpayment.
>
> "(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.
>
> "(2) To establish that an individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss."[16]

In this case, while appellant has argued that he relies on his compensation at the rate of 75 percent each month to pay his expenses, he has submitted no evidence establishing that he relinquished a valuable right or changed his position for the worse in relying on the overpaid compensation. The Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.

As appellant has not shown that recovery would "defeat the purpose of the Act" or would "be against equity and good conscience," the Board finds that the Office properly denied waiver of recovery of the overpayment.

[15] *Robert E. Wenholz*, 38 ECAB 311 (1986).

[16] 20 C.F.R. § 10.437 (1999).

Finally, the Board finds that the Office did not abuse its discretion by ordering repayment of the overpayment by deducting $330.00 from each of appellant's continuing periodic compensation payments.

With regard to the amount withheld from appellant's continuing compensation payments to recover the amount of the overpayment, section 10.441(a) of Office regulations provides:

> "When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship."[17]

Based upon appellant's information regarding his income, assets and expenses, the Office's decision to withhold a total of $330.00 from appellant's continuing compensation benefits was made with due regard to his monthly household income and monthly expenses and assets and is, therefore, appropriate under the circumstances of the case. Therefore, the Board finds that the Office did not abuse its discretion under the standard noted above in determining that repayment of the overpayment could be accomplished by withholding $330.00 every four weeks from appellant's compensation.

The July 11 and June 13, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
July 17, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[17] 20 C.F.R. § 10.441(a) (1999).